IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 15TH OCTOBER 2007 / 23RD ASWINA 1929

CRL.A.No. 2014 of 2003(D)

SC.450/2000 ON THE FILE OF THE COURT OF THE ADDL. SESSIONS JUDGE (ADHOC) II, KASARAGOD.

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APPELLANT: ACCUSED:

ABDUL LATHEEF, S/O. B.A.MUHAMMED,
POONKALA, NADUMANE HOUSE, PERMUDA, BADOOR VILLAGE.

BY ADV. SRI.T.G.RAJENDRAN

RESPONDENTS: COMPLAINANT & STATE:

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1. THE SUB INSPECTOR OF POLICE,
KUMBLA POLICE STATION.

2. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY P.P.SRI.PUZHAKKARA MOHAMMED FOR R2

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15-10-2007 , THE COURT ON 15/10/2007 DELIVERED THE FOLLOWING:

Crl.M.A.No. 12995/2003 in Crl.A.No. 2014/2003

Dismissed.

15th October, 2007

Sd/-K. Thankappan,
Judge.

mn.

K.Thankappan,J.

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Crl.L.P.No. /2006

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Judgment

-12-2006

K. Thankappan, J.

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Crl. A. No. 2014 of 2003

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Dated this the 15th day of October, 2007

JUDGMENT

Appellant challenges the judgment in S.C. No. 450/2000 on the file of the Court of the Addl. Sessions Judge (Adhoc) II, Kasaragod. By the impugned judgment the appellant was found guilty under section 55(a) of the Abkari Act and he was convicted thereunder and sentenced to undergo rigorous imprisonment for one year and to pay fine of Rs.1,00,000/- and in default to undergo rigorous imprisonment for a further period of three months.

2. The prosecution case is that the appellant was found in possession of 48 bottles each containing 180 ml. of A.J. Fenny (Indian Made Foreign Liquor) in contravention of the provisions of the Abkari Act and thereby committed the offence under section 55(a) of the Abkari Act. To prove the prosecution case, PWs.1 and 2 were examined and Exts.P1 to P8 were marked. When the appellant was questioned under section 313 Cr.P.C., he denied the allegation. The trial court on relying on the evidence of PW2 detecting officer found that the prosecution had succeeded in

proving the charge against the appellant beyond reasonable doubt and hence he committed the offence under section 55(a) of the Abkari Act .

3. In this appeal the learned counsel for the appellant challenges the finding of the trial court on the ground that the prosecution had not proved its case against the appellant by adducing acceptable evidence, as the only evidence adduced by the prosecution is that of PW2 detecting officer. It is further contended that in the light of decisions reported in Surendran V.State of Kerala (2004(1) KLT 404 and Sudhepan @ Aniyan V. State of Kerala (2005(2) KLT (Cri) 631), the finding of the trial court that the appellant had committed an offence punishable under section 55(a) of the Abkari Act is not sustainable. It is further contended that if the evidence adduced by the prosecution is accepted, the offence committed by the appellant only would come under section 63 of the Abkari Act.

4. As per the evidence of PW2 detecting officer, the appellant was found in possession of a bundle in his hand and on examination it was found that it contained 48 bottles of A.J. Fenny of 180 ml. each. PW1 is the independent witness who attested Ext.P1 scene mahazar. He admitted his signature in Ext.P1 scene mahazar and also admitted his presence at the time of preparation of the mahazar. Ext.P8 chemical analysis report would show that the samples contained 33.25% and 35.53% of ethyle alcohol by volume.

The trial court has mainly relied on the evidence of PW2 detecting officer to find the appellant guilty.

5. Question to be decided in this appeal is whether the finding entered by the trial court relying on the evidence of PW2 detecting officer alone is correct or not?

6. PW2 is the detecting officer. He arrested the appellant, prepared seizure mahazar and registered the crime. He himself conducted the investigation of the case and laid the charge. PW1 is the occurrence witness. He was declared hostile to the prosecution. The prosecution had not given any explanation for the non-examination of two witnesses in Ext.P3 seizure mahazar in supporting the evidence of PW2. The trial court mainly relied on the evidence of official witness to come to the conclusion that the appellant was found in possession of 48 bottles of A.J. Fenny on the day of the incident. There is no legal bar to prove the case through the evidence of official witnesses, if their evidence is free from infirmity. PW.2 had given evidence before the court that the appellant was found in possession of appellant was found in possession of 48 bottles each containing 180 ml. of A.J.Fenny (Indian Made Foreign Liquor). Though this witnesses was cross-examined, his evidence has not been shattered. In the above circumstances, this Court is of the view that the trial court is fully

justified in relying on the evidence of the official witness to find that the appellant was found in possession of the contraband articles as alleged by the prosecution.

7. Next question to be considered is that as per the principle laid down in Surendran's case (Supra) and Sudhepan's case (Supra), the finding of the trial court that the appellant committed an offence punishable under section 55(a) of the Abkari Act is not sustainable or not? In Surendran 's case (Supra) a Division Bench of this Court held that when a person is in "possession of illicit liquor" while illegally importing it, the case would be covered under section 55(a) of the Abkari Act. In Sudhepan @ Aniyan (Supra) this Court held that under section 55(a) the prosecution must allege and prove that possession of the contraband liquor was incidental or in connection with export, import, transport or transit of liquor. As per the provisions of the Abkari Act, the prosecution should prove that the article was found in possession of the accused was in connection with export, import, transport or transit of liquor. In the light of the above, this Court is of the view that the finding of the trial court that the appellant had committed an offence punishable under section 55(a) of the Abkari Act is not sustainable.

8. After considering the entire evidence, the trial court found that the prosecution had proved that the appellant was found in possession of

48 bottles each containing 180 ml. of A.J.Fenny (Indian Made Foreign Liquor). Section 11A of the Foreign Liquor Rules stipulates that no quantity of foreign liquor in excess of the quantity prescribed by the Government as per notification issued under section 13 of the Act shall be possessed or stored by any person within the State unless the same is covered by a permit issued by the officer in charge of the Division concerned. The prosecution has proved that the appellant was found in possession of 48 bottles each containing 180 ml. of A.J.Fenny (Indian Made Foreign Liquor) in contravention of the rules. The prosecution had not adduced any evidence to show that the appellant was engaged in selling the same. Hence, violation of rule 11A of the Foreign Liquor Rules is, therefore, attracted in the facts and circumstances of this case. Therefore, possession of 48 bottles each containing 180 ml. of Indian Made Foreign Liquor in contravention of the rules, is an offence punishable under section 63 of the Abkari Act . Hence, the appellant is found guilty under section 63 of the Abkari Act and convicted thereunder.

9. The next question to be considered is with regard to the sentence awarded against the appellant. The learned counsel for the appellant submits that the prosecution had not produced the material objects before the court as alleged in the charge. It is to be noted that as per the forwarding note sent by the Sub Inspector of Police for sending the samples for chemical

analysis does not contain any seal of the officer. As per Ext.P6 property list the material objects were verified and returned for safe custody. In Ext.P6 it is stated that 46 bottles already seized and two other bottles were taken for sample and produced along with a sack before the court. The incident happened, according to the prosecution, is on 21-9-1990. Even before committal court the properties were produced only on 28-9-1998. It is relevant to note that the material objects were not produced before the court in time as per Ext.P6 property list. The explanation is not acceptable as it is only an evasive. As per the dictum laid down by this Court in a decision reported in Narayani V. Excise Inspector (2002(3) KLT 725) it is the duty of the prosecution to prove that the sample and residue are kept in the proper custody till date of producing the same.

10. Considering all these aspects, this Court is of the view that pay a fine of R.5,000/- and in default to undergo simple imprisonment for three months under section 63 of the Abkari Act will meet the ends of justice. Hence, the appellant is sentenced to pay a fine of Rs.5000/- and in default of payment of fine to undergo simple imprisonment for three months. Bail bond executed by the appellant shall stand cancelled.

The appeal is partly allowed, accordingly.

K. Thankappan,
Judge.

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K. Thankappan,J.

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Crl.A. No. 2014 of 2003

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Judgment

15-10-2007